Supreme Court, U.S.
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No. 94-391

In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

v.

CHARLES E. SIMS, CHAPTER 11 TRUSTEE OF THE BANKRUPTCY ESTATE OF UNICOM COMPUTER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a bankruptcy action to avoid a preferential transfer, can the transferee satisfy 11 U.S.C. § 547(c)(2)(C), the ordinary business terms element of the ordinary course of business exception, by establishing only the terms of the pre-insolvency dealings between the transferor and transferee, without establishing that the transfer was made according to ordinary business terms by any objective standard?

LIST OF PARTIES

Charles E. Sims, as Trustee and the Respondent herein, does not disagree with the List Of Parties set forth in the Petition For A Writ Of Certiorari submitted by the Petitioner.

RULE 29.1 LISTING

Unicom Computer Corporation, the appellee below, is a California corporation, and has no parent companies, subsidiaries or affiliates. The Respondent before this Court is an individual acting as a trustee, and is not a corporation.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles E. Sims, as chapter 11 trustee of the bankruptcy estate of Unicom Computer Corporation ("Respondent"), the Respondent herein, respectfully requests that the petition of International Business Machines Corporation ("IBM" or "Petitioner") for a writ of certiorari in this case be denied.

JURISDICTION

The Respondent agrees with the jurisdictional statement set forth in the petition submitted on behalf of Petitioner.

STATUTORY PROVISION INVOLVED

11 U.S.C. § 547(c)(2) provides as follows:

(c) The trustee may not avoid under this section a transfer –

* * *

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

STATEMENT OF THE CASE

A. Preferences and Ordinary Course Defense

Section 547 of the United States Bankruptcy Code[1] authorizes a trustee or debtor-in-possession to avoid and

[1] Unless otherwise stated, all statutory references herein are to the United States Bankruptcy Code, Title 11 of the United States Code.

recover certain transfers of property made by the debtor within 90 days preceding the commencement of a bankruptcy case, in order to nullify the preference that a debtor may give to one creditor to the detriment of other creditors shortly before bankruptcy ensues. The purpose of Section 547 is to "prevent favoritism among the debtor's creditors who ought in fairness to stand on the same footing." *See* 4 *Collier on Bankruptcy*, § 547.05 at 547-36 (Lawrence P. King ed., 15th ed. 1993). Section 547(c) sets forth several exceptions to the recovery of preferences, and in particular, Section 547(c)(2) sets forth the "ordinary course" exception, which excludes from recovery transfers made in the ordinary course of business. As with all such affirmative defenses, the transferee has the burden of proving the elements of the ordinary course defense. Section 547(g).

In order to avail itself of the ordinary course defense, a transferee must establish each of three requisite elements, which are stated in the conjunctive: That the debt was incurred in the ordinary course of the business of both the debtor and the creditor, Section 547(c)(2)(A); that the payment was made and received in the ordinary course of their respective businesses, Section 547(c)(2)(B); and that the payment was "made according to ordinary business terms," Section 547(c)(2)(C).

It is the last of those requirements, "made according to ordinary business terms," that is in question in this case involving the chapter 11 case of Unicom Computer Corporation ("Unicom"). As each Court of Appeals that has considered the matter has concluded, Section 547(c)(2)(C) requires a showing of ordinary business terms by objective standards. As discussed hereinbelow,

courts of appeals have required a showing that the transfer in question is consistent with the practices of companies other than the transferor and transferee within the relevant industry. In the case at bar, the Petitioner provided no evidence at all of any objective standards, industry-wide or otherwise.

Instead, the Petitioner produced evidence only of an intermittent practice between its local office and Unicom only, in deviation from IBM's established national policy. On that basis, both the District Court and the Court of Appeals concluded that the Petitioner had not satisfied its burden under the language of Section 547(c)(2)(C), and that, therefore, the Petitioner could not avail itself of the "ordinary course" defense as to 32 of the 40 transfers in question.

B. Pre-Bankruptcy Relationship

Unicom became a debtor under the provisions of chapter 11 of the Bankruptcy Code in 1988. [App.[2] 12.] In September 1990, Unicom filed suit against IBM in order to recover 40 payments made by Unicom to IBM within the 90 days preceding the commencement of the chapter 11 case, pursuant to the provisions of Section 547.

Unicom's payments to IBM arose out of a relationship pursuant to which Unicom purchased computer equipment and services from IBM for leasing to end-

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[2] "App." refers to the Appendix attached to the Petition filed herein by IBM.

users throughout the country. [ERT.[3] 12:3-13:1.] Unicom was in the business of computer leasing, and it purchased much of its inventory from IBM. [*Id.*] Of the 40 payments in question, 28 represented payment for the sale of machinery requiring installation by IBM, and 12 represented payments for taxes, hourly services, publications, purchase of parts or performance under maintenance agreements, which did not require installation services by IBM. [ERE.[4] 41; ERE. 1-40; ERT. 7, App. 13.]

Invoices for the 12 transactions not involving installation all indicated that they were due upon receipt or within 30 days from invoice date. [ERE. 8, 9, 11, 17, 21, 30-33, 35, 36 and 39; ERT. 7.] Of those 12 payments, none satisfied the stated invoice terms, and all were made between 97 and 198 days after invoice date. [ERE. 41; ERT. 7.]

The payment terms set forth on the invoices for the 28 payments involving installation stated that payment was "due on the date of installation." [ERE. 1-7, 10, 12-16, 18-20, 22-29, 34, 37, 38 and 40; ERT. 7.] Notwithstanding that invoice language, IBM maintained a nationwide policy relating to the collection of invoices on purchases of new equipment by equipment lessors such as Unicom, allowing a grace period of up to 30 days after installation. [ERT. 18, 57, 58 and 70.] The policy had been instituted by

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[3] "ERT." refers to the Excerpts of Record: Trial Transcipt, filed by Unicom with the United States Court of Appeals for the Ninth Circuit on April 16, 1993.

[4] "ERE." refers to the Excerpts of Record: Trial Exhibits, filed by Unicom with the United States Court of Appeals for the Ninth Circuit on April 16, 1993.

IBM as a result of negotiations with a national trade association of computer lessors seeking additional time in which to arrange financing of equipment purchases. [*Id.*; ERT. 146:17-147:9.]

In a memorandum distributed to all of its branch managers, IBM's national office described its national grace period policy, and clarified that the 30-day grace period represented an absolute outer limit for tolerance of late payments:

> "The terms of our purchase contract state that payment is due upon installation. Our objective is to collect our monies at the time of installation or as soon as is practical after installation. Prior to the installation of purchased equipment, you should determine what constitutes a reasonable amount of time for the collection of monies due.
>
> Most invoices can and should be paid at or near installation. *In any event, payments should not exceed 30 days from the Date of Installation.*
>
> Does IBM give leasing companies different payment terms than commercial customers, that is, 30 days in which to pay purchase of new invoices? No. The terms of our purchase contract apply. Because of the additional paperwork required in a leasing company purchase of new transaction, we have agreed that *a reasonable amount of time should be no more than 30 days* to collect for a purchase transaction. *IBM expects payment earlier than 30 days.* Our evaluation of leasing company transactions indicates that *30 days is a reasonable maximum time for payment.*"

[ERE. 44; ERT. 9.] (Emphasis added.)

Of the 28 payments involving installation, only 8 were paid within 30 days of installation or within 30 days

after IBM mailed to Unicom a late installation notice. [ERE. 1, 2, 12-15, 18, 40 and 41; ERT. 7.] All other payments were made more than 30 days after installation or notice, and in some cases up to 184 days after installation. [ERE. 41; ERT. 7.]

C. Bankruptcy Court Trial and Decision

At the trial of the preference lawsuit in the United States Bankruptcy Court for the Northern District Of California, the elements of Unicom's case in chief were uncontested, and the trial dealt only with IBM's affirmative defenses. IBM raised three such defenses, a "contemporaneous exchange" defense under Section 547(c)(1), an argument that the transferred funds were not property of Unicom, involving Section 547(b), and an "ordinary course" defense under Section 547(c)(2). [App. 27.] The first two of those affirmative defenses were rejected by the Bankruptcy Court and are not at issue before this Court. [App. 27, 28.]

As to the third affirmative defense, a Section 547(c)(2) "ordinary course" argument, IBM presented no evidence that the payments in question were in the ordinary course of business in the context of industry practices. Unicom presented evidence of the national grace period policy instituted by IBM [ERE. 44; ERT. 9], allowing equipment lessors a payment grace period of up to 30 days after installation, and adduced evidence that the policy had resulted from negotiations between IBM and a nationwide equipment lessor association. IBM offered no evidence to refute the efficacy of the policy, nor did it offer any evidence that the corporate policy had been changed at any time.

Instead, IBM supported its "ordinary course" defense merely by presenting evidence of an intermittent local practice of one of IBM's regional offices, occasionally deviating from the clearly articulated national grace policy of IBM.

The local branch of IBM which handled Unicom collections was administratively managed by Sandra Santiago. [ERT. 55-56.] At trial, Ms. Santiago acknowledged that the national policy was that payment should never exceed 30 days after installation [ERT. 70:8-19] and that it was IBM's corporate policy that IBM expected payment earlier than 30 days. [ERT. 70:20-23.] Ms. Santiago testified that in some instances, Unicom was allowed to delay its payment until the end of the calendar month in which the 30-day deadline occurred. [ERT. 61.]

Ms. Santiago acknowledged that she did not know whether other local offices deviated from IBM national policy as well. [ERT. 70:24-71:3.] Significantly, Ms. Santiago testified that her office's practice of allowing payment beyond 30 days after installation was not the rule, and was applied only on an "occasional" basis. [ERT. 78:4-9.] Consistently, Larry Pulliam, IBM's sales manager for the San Francisco Bay Area, confirmed that the office in question allowed leasing customers more than 30 days only "occasionally." [ERT. 143:14-21.]

At the trial, IBM offered no evidence whatsoever to demonstrate that the local office's occasional practice had any nationwide, or industry-wide, application, or that the practice was applied consistently either with Unicom or with any other customer of IBM, much less among parties

other than IBM and Unicom. Further, evidence established that of the 40 payments in question, only 3 fit within the relaxed payment terms occasionally allowed by the local office, and that, in all, 15 payments satisfied neither IBM's national policy nor the local office's intermittent practice. [ERE. 41; ERT. 7.] IBM offered no evidence to explain or overcome that evidence.

The trial before the Bankruptcy Court occurred on September 24, 1991, and on the same date, the Bankruptcy Court prepared and filed its Memorandum of Decision. [App. 26-30.] In that decision, the Bankruptcy Court concluded that it was "absolutely clear and uncontradicted" that Unicom was contractually obligated to pay IBM upon installation, and that it was IBM's written policy to allow purchasers up to 30 days after installation to make payment, notwithstanding contractual terms. [App. 28.] The Bankruptcy Court further determined that "the local office handling [Unicom's] account always allowed purchasers up until the last day of the month following the month of installation to pay, notwithstanding the contract and the written policy . . . . " [App. 28.]

The Bankruptcy Court made no mention of the fact that IBM's own personnel had stated that their practice of allowing more than 30 days for payment was not the rule, but rather the exception, and the Bankruptcy Court made no statement as to the established facts that many of the payments in question did not even satisfy that attenuated and occasional practice. The Bankruptcy Court ruled entirely in IBM's favor, and judgment against Unicom was entered on October 3, 1991. [App. 31-32.]

D. District Court Opinion

Upon appeal to the United States District Court for the Northern District of California, the District Court reversed the Bankruptcy Court's decision as to 32 payments, and entered judgment in Unicom's favor in the amount of $801,405.24. [App. 21-23.] In its Memorandum Opinion dated July 15, 1992 [App. 11-20], the District Court found that while 8 transfers were made in the ordinary course of business pursuant to IBM's national policy, the other 32 transfers did not fall within the "ordinary course" affirmative defense and were therefore recoverable. [App. 19-20.]

The District Court found that the provisions of Section 547(c)(2)(C) required a showing that the payment in question was in the ordinary course of business by objective or industry standards [App. 16-17], and that no evidence had been presented by IBM concerning any such standards. [App. 18.] The District Court found that, at most, IBM had presented evidence of a local standard for computer lessors dealing with one office of IBM, but no standard that was industry-wide or that had been shown to be applied by companies other than IBM. [App. 19, ftnt. 6.] The District Court ruled that IBM's showing of compliance with an objective standard was "inadequate as a matter of law." [App. 19, ftnt. 6.]

The District Court concluded that the national grace period policy of IBM, by its inherent reasonableness, constituted a national policy of IBM and that payments that did not comport with that policy could not be construed as having been made according to ordinary business terms. [App. 19.] The District Court therefore ruled

that as to the 32 payments, IBM had not met its burden of proof that the payments in question were made according to ordinary business terms by objective standards, and that IBM's affirmative defense therefore failed with regard to those payments.

E. Court of Appeals Decision

IBM appealed from the District Court's decision to the United States Court of Appeals For The Ninth Circuit, and the Court of Appeals issued its decision on April 13, 1994. [App. 1-10.] In its unpublished decision, the Court of Appeals reconfirmed a prior holding that Section 547(c)(2)(C) requires a showing that the transfers at issue are ordinary in relation to prevailing business standards, and that, as such, the statute "requires proof that the challenged transfer was made pursuant to an *objective standard* based on practices common to businesses similarly situated to the debtor and transferee." [Memorandum, App. 6, quoting *In re Loretto Winery, Ltd.*, 107 B.R. 707, 709 (9th Cir. BAP 1989) (emphasis in original)].

The Court of Appeals observed that the only issue before it was whether IBM's previous "pattern of dealing" with Unicom was sufficient to satisfy the "ordinary business terms" requirement of Section 547(c)(2)(C). [App. 6.] In its analysis, the Court of Appeals concluded that IBM produced "virtually no evidence of an industry-wide standard beyond the 30-day grace period it had already negotiated with the trade association" [App. 7], and had at best shown that a local branch had allowed Unicom to pay its invoices well after they were due, and

that that same office had occasionally allowed other clients to do so as well. [App. 7-8.]

The Court of Appeals affirmed the District Court's conclusion, on the basis that the objective standard required by Section 547(c)(2)(C) had not been established or satisfied by IBM, and that, therefore, as to the 32 payments which the District Court had concluded were avoidable, IBM had failed to show by a preponderance of evidence that the payments fit within the "ordinary course" exception.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Among Decisions Of United States Courts Of Appeals With Respect To The Issue That Was Decisive In This Case.

Mindful no doubt of the provisions of Rule 10.1(a) of the Rules of the Supreme Court of the United States, pursuant to which a conflict among courts of appeals may be considered in deciding whether to review the decision of the Court of Appeals in this case, IBM contends in its Petition that there is a conflict among the holdings of courts of appeals with respect to decisive issues in this case. In fact, a review of pertinent decisions of courts of appeals reveals that there is no conflict at all with respect to the issue that was decisive in this case.

1. Objective Standard of Sec. 547(c)(2)(C)

In this matter, both the District Court and the Court of Appeals recognized and held that a transferee asserting the Section 547(c)(2) "ordinary course" defense must carry the burden of proof in demonstrating that the transfer in question satisfied an objective standard under the provisions of Section 547(c)(2)(C), in order to prevail. In particular, both such Courts concluded that in order to prove its "ordinary course" defense, IBM was required to demonstrate that the transfers in question were consistent with ordinary transactions within the relevant industry or with other companies similarly situated.

Both Courts concluded that IBM failed to establish any industry practice or practice of similarly situated companies, other than the 30-day grace period set forth in IBM's own manual. Inasmuch as the payments in question were not consistent with that grace period, both Courts concluded that IBM failed to show by a preponderance of evidence that the preferential transfers fit within the "ordinary course" exception.

The Courts' conclusion that the transferee must demonstrate consistency with an objective standard in order to satisfy the requirement of Section 547(c)(2)(C) is entirely consistent with the decisions of each court of appeals that has considered the matter. Each such court of appeals has concluded that Section 547(c)(2)(C) requires a showing that the transfer in question is made according to ordinary business terms as determined by objective industry standards.

2. No Conflict Among Circuits

For example, in *In re Fred Hawes Organization, Inc.*, 957 F.2d 239 (6th Cir. 1992), the Court of Appeals for the Sixth Circuit held, as it had in a prior published decision, that Section 547(c)(2)(C) requires a showing of ordinary business terms by an objective standard, in contrast to the requirement of Section 547(c)(2)(B), which requires such a showing by a subjective standard. The Court of Appeals stated that

> [t]he objective prong (subsection (C)) requires proof that the payment is ordinary in relation to the standards prevailing in the relevant industry. *WJM, Inc.*, 840 F.2d at 1010-11.

Id. at 244.

As pointed out by that Court of Appeals, to hold otherwise "would not only ignore the clear language of the statute, but would effectively render subsections (B) and (C) superfluous to each other." *Id.* Because subsections (B) and (C) are read in the conjunctive, each must be proven; the distinction between the two subsections is that subsection (B) refers to terms between the particular transferor and transferee, whereas subsection (C) makes no reference to those particular parties, thereby requiring a showing that is more general and objective than merely the relationship between the two parties in question. Moreover, as stated by the Sixth Circuit Court of Appeals, the objective standard is not satisfied by the transferee demonstrating its normal terms with other debtors, and instead requires demonstration of terms among other parties all together:

> [C]ourts do not look only at the manner in which one particular creditor interacted with other similarly situated debtors, but rather analyze whether the particular transaction in question comports with the standard conduct of business within the industry. [Citations omitted.]

Id. at 246.

Similarly, the Court of Appeals for the Seventh Circuit, in *Matter of Tolona Pizza Products Corp.*, 3 F.3d 1029 (7th Cir. 1993), has clearly determined that Section 547(c)(2)(C) requires a showing of ordinary business terms within the relevant industry. Through the same analysis of Sections 547(c)(2)(B) and (C), the Seventh Circuit Court of Appeals concluded that the only reasonable interpretation of Section 547(c)(2)(C) is that it requires satisfaction of an objective test for ordinary business terms:

> The functions that we have identified, combined with a natural reluctance to cut out and throw away one-third of an important provision of the Bankruptcy Code, persuade us that the creditor must show that the payment he received was made in accordance with the ordinary business terms in the industry. . . .

Id. at 1032-1033.

The Eighth Circuit Court of Appeals has come to the same conclusion. In *In re U.S.A. Inns of Eureka Springs, Arkansas*, 9 F.3d 680 (8th Cir. 1993), that Court of Appeals held that Section 547(c)(2)(C) requires proof of an objective industry practice, *Id.* at 684, specifically necessitating "evidence of a prevailing practice among similarly situated

members of the industry facing the same or similar problems." *Id.* at 685. The Tenth Circuit Court of Appeals too has held that the "ordinary business terms" referenced in Section 547(c)(2)(C) "are those used in 'normal financing relations': the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy." *In re Meredith Hoffman Partners*, 12 F.3d 1549, 1553 (10th Cir. 1993).

In *In re Molded Acoustical Products, Inc.*, 18 F.3d 217 (3rd Cir. 1994), the Third Circuit Court of Appeals adopted the view of the Seventh Circuit Court of Appeals, with some "embellishment," concluding that the words "ordinary business terms" in Section 547(c)(2)(C) refer to a range of terms encompassing practices in which firms within the same industry engage. *Id.* at 220. Thus, that circuit court as well has accepted the interpretation of Section 547(c)(2)(C) requiring application of an objective standard. It is noteworthy that in its decision, the Third Circuit Court of Appeals pointed out that evidence of how the transferee dealt with only one company other than the debtor is not evidence of industry terms, and is insufficient as a matter of law to satisfy the standard required by Section 547(c)(2)(C). *Id.* at 221.

The Fourth Circuit Court of Appeals in *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479 (4th Cir. 1992), implicitly accepted the prevailing interpretation of Section 547(c)(2)(C) that requires the showing of an objective standard, by comparing the dealings of the debtor and transferee in that case to similar transactions involving other parties. *Id.* at 488.

The Eleventh Circuit Court of Appeals dealt with the Section 547(c)(2) "ordinary course" defense in its decision in *In re Craig Oil Company*, 785 F.2d 1563 (11th Cir. 1986). However, in that case, the Court concluded that the transfers in question were extraordinary even in the context of normal payment terms between that particular debtor and transferee, particularly in light of the fact that the payments were late, were made following collection efforts by the transferee and were made by cashier's checks, an unprecedented mode of payment for those parties.

Because the payments were unusual even within the particular parties' relationship, they failed to satisfy the subjective standard of Section 547(c)(2)(B), and there was no need to look further. That is, because the requirements of Sections 547(c)(2)(A), (B) and (C) are conjunctive, and because the transfers in that case failed to satisfy even the subsection (B) standards as to normal dealings between the parties, there was no need to inquire as to satisfaction of the objective standards of subsection (C). The Court of Appeals for the Eleventh Circuit did not discuss whether Section 547(c)(2)(C) compels an objective test.

Thus, there is no conflict at all among any of the courts of appeals as to the interpretation of Section 547(c)(2)(C). Almost all of those courts of appeals have expressly held that Section 547(c)(2)(C) requires a showing that the transfer in question is ordinary by objective industry standards, and those courts of appeals that have not so held explicitly have either reached the same conclusion implicitly or have not addressed the issue at all. In particular, contrary to IBM's assertions in its Petition,

the Eleventh Circuit Court of Appeals, in *Craig Oil Company*, has *not* concluded that "subsection (C) may be satisfied solely by evidence bearing on prior dealings between the parties," [Petition, p. 10], but has simply not confronted the issue since the transfers in question failed to satisfy other concurrent tests as well.

As a result, it is clear that any court of appeals entertaining the facts presented by IBM and Unicom in this case would rule in the same manner as did the Ninth Circuit Court of Appeals. Section 547(c)(2)(C) requires the transferee to demonstrate that the transfers are ordinary by industry standards, and that is decisive in this case. IBM presented no evidence of industry standards other than the national 30-day grace period set forth in IBM's own manual, and all of the payments in question clearly ran afoul of that policy. Rather than present any evidence of a contrary industry practice or policy, IBM simply provided evidence of an intermittent and exceptional practice within one local office of IBM, dealing with only Unicom and other occasional customers. Thus, IBM's proof failed as a matter of law, and would have so failed before any other court of appeals in the nation. The Court of Appeals' decision in this case rests on a decisive issue as to which there is no conflict among courts of appeal.

3. IBM's Purported Conflict

In its Petition, IBM argues that there are conflicts among the courts of appeals with respect to issues relevant to the case at bar. As demonstrated above, that is not so. In fact, the conflict discussed in IBM's Petition involves not the issue before the Courts in this matter, but rather extraneous issues that are neither decisive nor relevant to the case at bar.

The differences of opinions among the courts of appeals identified in the Petition deal not with whether Section 547(c)(2)(C) requires an objective standard – all courts agree that it does. Rather, the conflict involves the method of determining that objective standard. For example, the decisions identified by IBM concern how broad a range of industry practices may be applied, the parameters of the relevant industry and the extent to which nonconformance with industry practices must be measured. None of the cases dispute the basic requirement that the objective standard, however measured, be applied and satisfied.

Thus, the conflicts among the courts of appeals identified in the Petition have no relevance to the case at bar. In the present case, there is no issue as to which industry practice or objective standard to apply, because only one was presented. Only IBM's national 30-day grace policy is in evidence, and none of the transfers in question comply with that policy.

The only other evidence presented by IBM concerns an intermittent exceptional practice of one local office of IBM, and under none of the courts of appeals' decisions

would that occasional practice be interpreted to be an objective standard. Although IBM characterizes that office's practice as a "regional industry practice," it falls far short of that mark: There was no evidence to show that even the local office applied that practice regularly, as its own employees described it as an "occasional" practice, and there is in fact no evidence that any company other than IBM applied that practice, or even that IBM itself applied the practice on a regular or consistent basis with companies other than Unicom. As pointed out by the Third and Sixth Circuits Courts of Appeals, evidence of how a transferee dealt with only one company, or even with many other companies, is insufficient as a matter of law to satisfy the standard required by Section 547(c)(2)(C). *Molded Acoustical Products,* 18 F.3d at 221; *Fred Hawes Organization,* 957 F.2d at 246.

Clearly, therefore, there is no conflict among the courts of appeals with respect to the decisive logic in this case, to wit, that Section 547(c)(2)(C) requires compliance with an objective industry standard, and that IBM failed in its proof in that regard.

B. There Are No Other Reasons For Review Of The Court Of Appeals' Decision In This Case.

Just as there is no conflict among courts of appeals that needs to be resolved by this Court, there are no other reasons for review of the decisions in this case. Whereas IBM argues that the Court of Appeals' decision in this case "has shackled creditors to a uniform industry-wide debt collection standard" [Petition, p. 17], the Court of Appeals' decision is far more restricted than that.

First, it should be noted that the Court of Appeals' ruling has not been published, and therefore has little or no impact upon other litigants or commercial transactions. In fact, the Court of Appeals' decision not to publish the ruling evidences its own sense that the ruling has little precedential value and is narrowly limited to the evidence existing in the case at bar.

Second, nothing in the Court of Appeals' ruling suggests, as IBM argues, that that Court requires a "uniform industry-wide debt collection standard." The simple fact is that the only policy or standard in evidence in this case was IBM's national policy published in its manual, allowing for a 30-day grace period. IBM did not refute the evidence of that policy, nor did it present evidence of any other industry practice or policy, whether uniform or otherwise. All that IBM did present was the intermittent practice of one of its own local offices, and that cannot be considered industry-wide or even regional. The practice was shown to apply only to occasional customers of that one office, and was not shown to be used regularly (even if not uniformly) by that office or any other office of IBM, much less by other vendors within the industry. Stated simply, the case did not involve a battle between a uniform industry-wide policy and a regional policy, because there was only evidence of an industry-wide policy and no evidence at all of a regional policy.

As a result, the dire predictions of IBM with respect to desperate searches for "rigid" industry standards and antitrust violations do not at all follow from the decision of the Court of Appeals in this case, and there are no reasons for this Court to accept review of the matter.

CONCLUSION

Based upon the foregoing, the Respondent respectfully submits that the petition for a writ of certiorari submitted by IBM should be denied.

Dated: September 27, 1994

Respectfully submitted,

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